

Office of the State Appellate Defender
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APPEAL

§2-2(b)

People v. Salem, 2016 IL 118693 (Nos. 118693, 118694, 1/22/16)

1. Under Illinois Supreme Court Rule 606(b), a notice of appeal must be filed within 30 days after the entry of the final judgment, or if a motion directed against the judgment is timely filed, within 30 days after the entry of an order disposing of the motion. In a criminal case, the entry of a sentence is the final judgment.

Rule 606 does not define the term “timely,” but the Code of Criminal Procedure provides timelines for filing various motions. A motion for a new trial is timely for purposes of Rule 606 if it is filed in compliance with the timelines set forth in the Code. Section 116-1(b) of the Code provides that a motion for a new trial shall be filed within 30 days after “the entry of a finding or the return of a verdict.” 725 ILCS 5/116-1(b).

2. Defendant was tried and convicted after two separate trials. In both cases, defendant filed a motion for a new trial more than 30 days after the finding of guilt, but less than 30 days after he was sentenced. The State did not object to the timeliness of either motion and the trial court denied them on the merits. Defendant then filed notices of appeal within 30 days after the denial of the motions, but not within 30 days after the trial court entered sentences in his case. The Appellate Court held that defendant did not file timely notices of appeal and thus it did not have jurisdiction to review his cases.

3. The Supreme Court agreed that defendant did not file timely notices of appeal and thus the Appellate Court did not have jurisdiction to hear his appeals. Defendant failed to file notices of appeal within 30 days after he was sentenced as required by Rule 606(b). He also failed to file motions for a new trial within 30 days of the verdict as required by section 116-1(b) and thus the deadline for filing notices of appeal was not extended by filing the motions.

4. But the Court exercised its supervisory authority to grant defendant relief. The Illinois Constitution vests the Supreme Court with supervisory authority over all the lower courts of the Illinois. Ill. Const. 1970, art. VI, §16. This authority is unlimited in extent and circumscribed by no specific rules. But, as a general rule, the Court will only issue a supervisory order if the normal appellate process will not provide adequate relief and the dispute involves a matter important to the administration of justice.

Here, given the unique facts of this case, where both the trial court and defense counsel were confused about the time limits on filing a motion for a new trial, the Court held that defendant had not been afforded adequate relief by the normal appellate process. It therefore exercised its supervisory authority and directed the Appellate Court to consider the merits of defendant’s appeal.

(Defendant was represented by Assistant Defender Jay Weigman, Ottawa.)

COLLATERAL REMEDIES

§§9-1(f), 9-1(i)(1)

People v. Sanders, 2016 IL 118123 (No. 118123, 1/22/16)

1. The Post-Conviction Hearing Act contemplates that only one petition may be filed without leave of the court. The bar against successive petitions will be relaxed in two instances: (1) where the petitioner satisfies the “cause and prejudice” test, or (2) where the petitioner demonstrates actual innocence. To demonstrate actual innocence, the petitioner must produce evidence which is newly discovered, material rather than merely cumulative, of such conclusive character as to likely change the result on retrial, and which could not have been discovered at an earlier time through the exercise of due diligence.

Leave to file a successive post-conviction petition based on actual innocence should be denied only where it is clear from a review of the petition and supporting documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. “In other words, leave of court should be granted where the petition’s supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence.”

2. Where a successive petition is filed without seeking leave, the trial court may choose to consider the petition if the supporting documentation supplies an adequate basis to determine whether the petitioner has adequately alleged cause and prejudice or actual innocence. In this case, it was unclear whether the trial court realized that the petition was successive. In any event, the court considered the petition and advanced it to the second stage. Thus, although no request for leave to file a successive petition was made, the trial court exercised its *sua sponte* authority to determine whether the petition should be moved to the second stage.

3. Whether the proceeding concerns a first or successive petition, the trial court’s dismissal of a petition without an evidentiary hearing is reviewed *de novo*. A post-conviction petition should be advanced from second stage to third stage proceedings where the allegations of the petition, liberally construed in favor of the petition and taken as true, are sufficient to invoke relief under the Act. The court rejected the State’s argument that the trial court must first make a threshold finding that the evidence is trustworthy before it determines whether the petition sets forth a colorable claim of innocence, noting that where the State files a motion to dismiss, all well-pleaded factual allegations are presumed to be true.

4. Where the trial court had conducted a third-stage evidentiary hearing on a codefendant’s post-conviction petition alleging actual innocence based on the same recanted evidence which defendant presented in his petition, the judge erred at defendant’s second-stage proceeding by relying on the credibility findings it made when it rejected the co-defendant’s claims. Credibility is not an issue at the second stage of post-conviction proceedings, and the trial court erred both because the factual allegations

of the petition are presumed to be true for purposes of the State's motion to dismiss and because the trial court may not consider matters outside the record.

5. However, the court concluded that defendant failed to show a sufficient case of actual innocence to advance to the third stage. A claim of actual innocence requires the petitioner to show that the evidence is newly discovered, material and not merely cumulative, of such conclusive character that it would probably change the result on retrial, and could not have been discovered earlier through the use of due diligence. Here, the recantation evidence was not of such conclusive character as to probably change the result on retrial because it conflicted with much of the evidence at trial and with other evidence which defendant submitted in support of his post-conviction petition.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

§9-2(a)

People v. Vari, 2016 IL App (3d) 140278 (No. 3-14-0278, 1/26/16)

The Appellate Court's jurisdiction in civil cases is generally limited to appeals from final judgments. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301. A final judgment is a determination by the court which disposes of all issues between the parties and terminates the litigation. The dismissal of a complaint without prejudice is not a final and appealable order.

Defendant filed an untimely *pro se* 2-1401 petition and served the State by standard United States mail. The State filed a special appearance and argued that the trial court did not have personal jurisdiction over the State because defendant failed to properly serve the State. The trial court granted the State's motion to dismiss on jurisdictional grounds. Defendant appealed.

The Appellate Court dismissed the appeal for lack of jurisdiction. The court held that defendant was not prejudiced by the dismissal and could have refiled immediately with proper service. Defendant's petition was already untimely when he filed it and there is no bar to filing successive 2-1401 petitions. A disposition on the merits of his petition could have been made much sooner if he had simply refiled than if the case had been heard on appeal and then reversed and remanded back to the trial court for further proceedings. Since the trial court's dismissal did not prejudice defendant, it was not a final appealable order.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

§9-2(a)

People v. Zimmerman, 2016 IL App (2d) 130350 (No. 2-13-0350, 1/13/16)

1. Section 2-1401 (735 ILCS 5/2-1401) provides a civil process for challenging a final judgment that is more than 30 days old. Where §2-1401 is used to challenge a criminal conviction, the State must be served by certified or registered mail.

The trial court may *sua sponte* dismiss a §2-1401 petition on the merits without giving notice or an opportunity to be heard. However, a dismissal on the merits before the State has been properly served is premature.

2. In **People v. Carter**, 2015 IL 117709, the Supreme Court clarified that a petitioner who seeks to invalidate a *sua sponte* dismissal due to defective service has the burden to provide a record which affirmatively shows that the State was not given proper notice. Defendant satisfied this burden where in his application to sue as a poor person he stated that due to his indigence, the certified mail requirement for serving the State should be waived. Because defendant expressly asked the trial court to waive the certified mailing requirement, the record affirmatively showed that the State was not served by certified or registered mail.

3. The court rejected the argument that because a prosecutor appeared on multiple occasions when the petition was set for consideration, the State waived the requirement of proper service. The court found that in order to waive proper service, the State must file a specific motion or responsive pleading or make an explicit statement that it is waiving proper service. The court declined to adopt the reasoning of **People v. Ocon**, 2014 IL App (1st) 120912, which concluded that a formal waiver by the State is not required where the State has actual notice of the petition.

Because the State did not enter a motion or responsive pleading or explicitly waive proof of service, the trial court acted prematurely by dismissing the petition although the dismissal occurred some 10 months after the petition was filed. The court noted that the trial court may ask the State on the record whether it is willing to waive service, and thereby give the State an opportunity to expressly waive the improper service.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

§9-5(d)

Montgomery v. Louisiana, ___ U. S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2016) (No. 14-280, 1/25/16)

Under **Teague v. Lane**, 49 U. S. 288 (1989), a new constitutional rule of criminal procedure applies to final convictions only if the rule is a “watershed rule of criminal procedure” which implicates the fundamental fairness and accuracy of criminal

proceedings. However, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules which forbid criminal punishment of certain primary conduct as well as those which prohibit a certain category of punishment for a class of defendants because of their status or offense.

Although **Teague** arose in the context of a federal *habeas corpus* proceeding, when a new substantive rule of constitutional law controls the outcome of a case the States are constitutionally required to give retroactive effect to that rule in State collateral proceedings. The court stressed that substantive constitutional rules place certain persons or punishments beyond the State's criminal enforcement power, and that by definition a conviction or sentence is unlawful where it is created by an unconstitutional provision.

CONFESSIONS

§10-3(d)

People v. Wright, 2016 IL App (5th) 120310 (No. 5-12-0310, 1/15/16)

1. **Miranda** warnings are required when a defendant is in custody and is subjected to interrogation, which includes express questioning or its functional equivalent. Interrogation includes any words or actions that the police should know are reasonably likely to elicit an incriminating response. This test focuses primarily on the perception of the defendant, rather than the intent of the police.

2. The police arrested defendant after seeing a man who resembled him in a video taken at the scene of an armed robbery. The arresting officer, Prather, testified that he had known defendant for most of his 26-year career and since he had no intention of interrogating defendant, thinking it would be pointless, did not give defendant **Miranda** warnings. Prather told defendant he was under arrest for armed robbery and told him about the video.

Prather placed defendant in his patrol car and drove him a block away where the police arrested Sharon, defendant's long-time girlfriend and the mother of his three grown children. When Defendant asked why they arrested Sharon, Prather answered that she might have knowledge of the crimes. Defendant said they should let Sharon go because she didn't know anything about it. Although defendant continued to deny involvement in the robberies, he told Prather that if he let defendant and Sharon go, he would tell the police who committed the crime and tell them where to find the gun and mask, two items which had not been previously mentioned. Prather told defendant he would not let him go because he was convinced, based on the video, that defendant was the offender.

Prather took defendant to a holding cell where he spoke to defendant several times. Defendant continued to assert his innocence and told Prather he did not commit “this kind of crime.” Prather agreed, but said defendant had been convicted of armed robbery before. Defendant said he could lead Prather to the guys who gave him the clothes. Prather said that was ridiculous since it was the video that had him “hemmed up and charged with” the offense. Prather admitted that when defendant claimed he was innocent, Prather argued with him and kept him engaged in conversation.

3. The Appellate Court held that Prather’s language and actions constituted interrogation. Prather engaged defendant in ongoing conversation, asked at least one question, discussed the inculpatory evidence, and argued with defendant, thus keeping him engaged in conversation. He also drove defendant to the place where Sharon was arrested and questioned by police. These actions were “particularly evocative” and likely to elicit an incriminating response. The fact that Prather never intended to question defendant and never expected defendant to make any admission was irrelevant. The proper focus was on defendant’s perception of Prather’s actions.

The court suppressed defendant’s statements and remanded for a new trial.

The dissent did not believe Prather action’s constituted interrogation since defendant freely engaged in conversation and volunteered information about the crime.

(Defendant was represented by Assistant Defender Alex Muntges, Mt. Vernon.)

§10-6(c)

People v. Gempel, 2016 IL App (3d) 140833 (No. 3-14-0833, 1/26/16)

1. Defendant lived next door to the victim of a homicide. The victim died from multiple stab wounds and the police saw scratches on defendant’s face. The police also learned that defendant often borrowed money from the victim and didn’t like it when she asked to be repaid.

Defendant went voluntarily to the police station to answer questions. The police gave defendant **Miranda** warnings and told him he was not under arrest. Defendant repeatedly denied any involvement in the offense. After 20 minutes, defendant said that he wanted to leave and wanted a lawyer. The police continued to question defendant, and he again requested to leave and get a lawyer. The police continued to question defendant, and defendant continued to profess his innocence.

Eventually the police left the room and then returned, arrested defendant, and took him into custody. A day later, the police obtained DNA evidence from material underneath the victim’s finger nails, but the DNA did not match defendant. On the

following day, defendant, still in custody, asked to speak with the police. After giving defendant new **Miranda** warnings, defendant made inculpatory statements.

The trial court found that defendant had been illegally arrested and that his statements were not sufficiently attenuated from the arrest to be admissible. On appeal, the State conceded that the police illegally arrested defendant but argued that the statements were attenuated.

2. Statements made after an illegal arrest may be admissible if they are sufficiently attenuated from the illegal arrest. Courts consider four factors in attenuation analysis: (1) flagrancy of police misconduct; (2) intervening circumstances; (3) proximity of time between arrest and statements; and (4) **Miranda** warnings.

Applying the four factors to this case, the Appellate Court concluded that defendant's statements were not sufficiently attenuated from the illegal arrest. All four factors weighed against attenuation.

First, the police misconduct was flagrant. During the initial interrogation, before the police arrested defendant, the police continued to interrogate defendant even after he had invoked his **Miranda** rights and requested to speak with an attorney. The police also engaged in purposeful misconduct when they arrested defendant without probable cause hoping that other evidence would turn up.

Second, there were no intervening circumstances, such as the discovery of new evidence supporting probable cause, that would have severed the causal connection between the arrest and the statements. Although the State did obtain DNA results from material found under the victim's fingernails, it did not match defendant and thus did not provide probable cause.

Third, defendant was detained for nearly 37 hours before he made his statements. This prolonged detention may have aggravated the taint of the illegal arrest and compelled defendant to confess.

Fourth, the police gave defendant **Miranda** warnings on several occasions, but they also continually disregarded defendant's request for counsel and to remain silent.

Since all four factors favored defendant, the court held that the State failed to meet its burden of showing that the statements were sufficiently attenuated from the taint of the illegal arrest. The trial court's suppression of the statements was affirmed.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

EVIDENCE

§§19-2(b)(2), 19-27(g)

People v. Pike, 2016 IL App (1st) 122626 (No. 1-12-2626, 1/27/16)

Evidence is admissible only if it is relevant to an issue in dispute. Relevant evidence is defined as evidence that makes the existence of any consequential fact more probable or less probable than it would be without the evidence. Ill. R. Evid. 401.

The State's expert compared a DNA profile found on a firearm connected to the offense with defendant's DNA profile and concluded that he could not be excluded as a contributor. But the expert's statistical analysis showed that approximately 50% of unrelated individuals also could not be excluded as contributors to the DNA profile found on the firearm. In other words, one out of every two randomly selected individuals could not be excluded. Defendant did not object to this testimony.

The Appellate Court held that the expert's testimony was irrelevant and should not have been admitted. Since the statistical evidence showed that 50% of the population could not be excluded as potential contributors, that probability did not make defendant's identification any more or less probable. It was thus irrelevant.

But the court further held that the admission of this testimony was not plain error. The evidence was not closely balanced and the error was not serious error and thus neither prong of the plain error doctrine was satisfied. Defendant's conviction was affirmed.

The dissent believed the evidence was closely balanced and thus would have reversed defendant's conviction.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

§§19-23(a), 19-25

People v. Thompson, 2016 IL 118667 (No. 118667, 1/22/16)

1. Under Illinois Rule of Evidence 701, lay opinion identification testimony is admissible if the testimony is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. When the identification is being made from a video recording or a photograph, both of which the jury is able to view for itself, the court held that such testimony is helpful where there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury.

It is not necessary to show that the witness has had sustained contact or intimate familiarity with, or special knowledge of the defendant. Instead, the witness must only have had contact with the defendant beyond what the jury has had to achieve a level of familiarity that would make the opinion helpful.

Courts should use a totality of circumstances approach in deciding whether such testimony is admissible, and should consider the following factors in making that decision: (1) the witness's general familiarity with the defendant; (2) the witness's familiarity with the defendant at the time the recording was made; (3) whether the witness observed the defendant dressed in a manner similar to the person depicted in the recording; (4) whether the defendant was disguised in the recording or changed his appearance between the time of recording and trial; and (5) the clarity of the recording and extent to which the person is depicted.

The absence of any of the above factors does not render the testimony inadmissible. And the extent of a witness's opportunity to observe the defendant goes to the weight, not admissibility, of the evidence.

2. Additional rules apply when lay opinion identification testimony is presented by law enforcement officers. Here, there is an added concern that evidence of the officer's relationship with defendant may end up revealing defendant's prior criminal history. The court therefore adopted certain precautionary procedures when officers provide opinion identification testimony.

When the State seeks to introduce such evidence, the circuit court should permit the defendant to examine the officer outside the presence of the jury so he may explore the officer's level of familiarity as well as any bias or prejudice. When the officer testifies, he may identify himself as a member of law enforcement, but to establish familiarity he should only testify about how long he knew defendant and how frequently he saw him.

Additionally, the court should instruct the jury before the testimony and in the final charge that it need not give any weight to such testimony and that it should not draw any adverse inference from the witness's status as a law enforcement officer.

3. Here the State introduced lay opinion identification testimony from four witnesses, three of whom were law enforcement officers. The Supreme Court held that the testimony of the three officers was not properly admitted, but the testimony of the civilian witness was proper.

(a) Deputy Sheriff Sandusky interrogated defendant after he was arrested and viewed a video and still image of a man stealing anhydrous ammonia from storage tanks. Sandusky testified that defendant was the person in the images. The court held that Sandusky gained a familiarity with defendant during his interrogation, an interaction that was "in a more natural setting" than the jury would have had from its limited exposure to defendant in the courtroom. Sandusky was thus more likely to correctly

identify defendant than the jury. But the trial court failed to employ the precautionary measures required for law enforcement witnesses and thus Sandusky's testimony was improper.

(b) Officer Jackson also identified defendant from the video and still image. But there was no evidence about how long he knew defendant or how often and under what circumstances he had seen him. There was thus no evidence demonstrating any basis for concluding that Jackson was more likely to correctly identify defendant than the jury. And the trial court failed to employ any precautionary measures prior to his testimony. Accordingly, Jackson's testimony was improper.

(c) Officer Huff was able to identify defendant from the video and still image based on his "previous dealings" with defendant. The court held that Huff had "a perspective of defendant that the jury did not have" and thus was more likely to correctly identify him. But his testimony was inadmissible because the court did not employ any precautionary procedures before admitting his testimony.

(d) Jessica Joslin identified defendant from the still image. She had never met or spoken to defendant, but she once saw him sleeping on the front porch of a mutual friend's house when she was "strung out on methamphetamine." The court held that "although close" there was a sufficient basis to conclude that she was more likely to correctly identify defendant than the jury. And because Joslin was not a law enforcement officer, the trial court did not have to employ any precautionary procedures. Joslin's testimony was thus admissible.

4. Although the court found that the testimony of the three officers was inadmissible, it held that the error was harmless. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

§19-23(b)

People v. Lerma, 2016 IL 118496 (No. 118496, 1/22/16)

1. The rights to due process and a fair trial include the right to present witnesses in one's behalf. Generally, expert testimony is permitted if by virtue of experience and qualifications the witness possesses knowledge which is not common to lay persons and the testimony will aid the trier of fact in reaching a conclusion. In determining whether expert testimony is admissible, the trial court must balance the probative value of the evidence against its prejudicial effect. The trial court should also carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case.

The trial court is given broad discretion to decide whether to admit expert testimony, and its decision is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.

In **People v. Enis**, 139 Ill. 2d 264, 564 N.E.2d 1135 (1990), the Illinois Supreme Court recognized developing authority in some jurisdictions that expert testimony concerning eyewitness identification should be admissible in certain circumstances, but suggested caution against the overuse of such testimony. Here, the court recognized that in the decades since **Enis** there has been a dramatic shift in the legal landscape such that the admission of expert testimony concerning the reliability of eyewitness testimony has become widely accepted. The court concluded, “[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony.”

2. The court concluded that the trial court abused its discretion by denying defendant's motion to admit expert testimony concerning the reliability of eyewitness identification testimony. Defendant initially presented a pretrial motion *in limine* to allow a witness who was an attorney and a licensed psychologist to testify as an expert on the topic of memory and eyewitness identification. The trial court denied the motion, stressing that the eyewitnesses knew defendant prior to the shooting.

Defense counsel filed a motion to reconsider and indicated that the expert would testify that misidentifications have occurred where witnesses knew the person who was identified beforehand. The trial court denied the motion to reconsider, stating that the most “glaring” reason was that the witnesses claimed to have known defendant before the offense. The court also noted that according to an Ohio Court of Appeals opinion, some 12 years earlier the defense's expert witness testified that the factors which indicate that eyewitness identification testimony is unreliable apply where the eyewitness is viewing a stranger. The trial court acknowledged that the expert contested the accuracy of the Ohio court's description of his testimony in that case, but stated that where an appellate court justice made such a description, “I am not going any further down that road.”

Defendant then filed a second motion to reconsider, tendering the report of a second expert who was a professor of psychology and a widely recognized expert in the field of human perception and memory. Before the second motion to reconsider was filed, the original expert had passed away. The new expert testified that although it would seem “intuitive to a jury” that a witness's identification would be more accurate if he or she is acquainted with the suspect, “this is not necessarily true.”

The trial court again denied the motion to reconsider, stating that it was ruling for the same reasons it set forth in denying the admission of the original witness's testimony.

In finding an abuse of discretion, the Supreme Court stated that expert testimony on the reliability of eyewitness identification was both relevant and appropriate because the only evidence against defendant consisted of eyewitness identifications made by two witnesses, one of whom was deceased at the time of trial and whose identification was admitted as an excited utterance. In addition, most of the factors which both experts identified as potentially contributing to the unreliability of eyewitness testimony “are either present or possibly present in this case.” These factors include the stress of the event itself, the use and/or presence of a weapon, the use of a partial disguise, exposure to post-event information, the fact that the event occurred at night, and the fact of cross-racial identification.

Furthermore, because one of the eyewitnesses had died, only one of the two eyewitnesses was subject to cross-examination. It was also unclear whether the witness who did testify actually knew the defendant before the identification, as she stated that she had seen him either 10 times or only once or twice, and in any event had only viewed him from across the street without ever speaking to him or being in the same room or house. When asked directly how long she had known the defendant before the shooting, she responded, “I did not know him.” Under these circumstances, expert eyewitness testimony on the reliability of eyewitness identification would have been probative.

3. The court also concluded that the trial judge abused his discretion by denying admission of the second expert’s testimony based on its rejection of the proposed testimony of the expert who died before trial. The original witness’s proposed testimony was rejected because of the judge’s “personal conviction” that mistaken identifications are unlikely where the witness and perpetrator knew each other before the offense.

The Supreme Court criticized the trial court’s reasoning, noting that the first expert’s report specifically addressed the issue of the likelihood of mistaken identifications where the witness and suspect knew each other and rebutted the trial court’s assumptions about what the expert would say. In addition, the reasons for excluding the first expert’s testimony had nothing to do with the testimony of the second expert, whose report flatly contradicted the trial court’s beliefs and whom the parties agreed was a qualified and highly respected expert. By relying on its personal beliefs concerning eyewitness identifications as the primary basis for denying the admission of the second witness’s testimony, the trial court not only ignored the explicit contents of the report of the expert but substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert. The court also noted that the trial court’s ruling was undercut by the conflict in the record concerning the extent to which the surviving eyewitness actually knew defendant before the offense.

Finally, the court rejected the trial court’s belief that the first expert’s testimony could be rejected based on a single sentence in an Ohio court opinion describing the expert’s testimony in an earlier trial. Not only did the expert contest the accuracy of the Ohio court’s summary of the evidence, but the testimony occurred some 13 years before the trial in this case. Rather than allow the witness to testify, however, the trial court chose to treat a one-sentence summary of the witness’s testimony 13 years earlier

“not only as indisputably accurate but also as a binding and authoritative representation” of the expert’s opinion at the time of trial.

4. The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The trial court’s ruling prevented the jury from hearing relevant and probative expert testimony concerning the State’s sole testifying eyewitness in a case in which there was no physical evidence connecting defendant to the crime, the remaining evidence of guilt was not overwhelming, and the excluded testimony was neither duplicative nor cumulative of other evidence.

Defendant’s convictions for first degree murder and aggravated discharge of a weapon were reversed and the cause remanded for a new trial.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)

§19-27(h)

People v. Grant, 2016 IL App (3d) 140211 (No. 3-14-0211, 1/29/16)

1. Under section 116-3 of the Code of Criminal Procedure, a defendant may make a motion in the trial court for the performance of forensic DNA testing. To prevail on the motion, a defendant must make a *prima facie* showing that identity was at issue in his trial and that the evidence has been subject to a proper chain of custody. Once defendant makes a *prima facie* showing, the court shall allow testing if it employs a generally accepted scientific method and has the potential to produce new, non-cumulative evidence materially relevant to defendant’s actual innocence, even though the results may not completely exonerate defendant. 725 ILCS 5/116-3.

2. Defendant was convicted of aggravated sexual assault. At trial, defendant testified that he did not commit the offense. Instead, another person residing in the same house committed the offense. Following his conviction, defendant filed a motion for forensic testing on a hair found on the victim. This evidence had been collected prior to trial but never tested. The trial court denied defendant’s motion.

3. On appeal, the State defended the trial court’s dismissal by arguing that (1) identity was not at issue during trial; and (2) testing would not produce evidence materially relevant to actual innocence. The Appellate Court rejected both of these arguments.

First, the court held that identity had been an issue at trial. In the context of a 116-3 motion, identity is at issue if it was disputed at trial as to whether defendant or someone else committed the offense. A defendant makes the requisite *prima facie* showing by denying at trial that he committed the offense.

Here defendant put identity at issue during trial by testifying that he did not commit the offense. The court specifically rejected the State's argument that identity was not at issue because there was overwhelming evidence of defendant's guilt. The amount of evidence presented by the State has no bearing on whether identity was at issue during trial. The only question is whether, as here, defendant denied committing the offense.

Second, the court held that testing had the potential to produce materially relevant evidence of defendant's actual innocence. Evidence it materially relevant if it significantly advances defendant's claim of actual innocence. No physical evidence linking defendant to the offense was introduced at trial. Thus if the hair found on the victim did not match defendant's DNA profile, "that result would stand alone, rather than being weighed against other forensic evidence against defendant." And if the hair matched the DNA of the person defendant claimed was the true perpetrator, it would significantly bolster defendant's case.

Although the State was correct that a non-match would not completely exonerate defendant, it was arguable that such a result would advance defendant's claim of actual innocence.

The cause was remanded for further forensic testing.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

HOMICIDE

§§26-2, 26-4(a)

People v. Lefler, 2016 IL App (3d) 140293 (No. 3-14-0293, 1/21/16)

Jury verdicts are legally inconsistent when the offenses arise out of the same set of facts and a jury finds that an essential element of the offense both exists and does not exist.

The victim caught defendant breaking into his car and during an ensuing struggle, defendant stabbed the victim, killing him. At trial defendant argued that he was acting in self-defense when he stabbed the victim. The jury found defendant guilty of both felony murder and second degree murder.

The Appellate Court held that the verdicts for felony murder and second degree murder were not legally inconsistent. A defendant commits first degree murder if he kills another and he: (1) intends to kill or do great bodily harm; (2) knows that his acts create a strong probability of death or great bodily harm; or (3) is attempting or committing a forcible felony. 720 ILCS 5/9-1.

Second degree murder is a mitigated form of first degree murder, but only as to the first two forms of first degree murder. The jury first determines that defendant killed another with intent or knowledge and then determines whether mitigating factors exist that would reduce the offense to second degree murder. But second degree murder does not apply to the third form of first degree murder, felony murder. 720 ILCS 5/9-2.

The jury clearly found that mitigating factors existed and properly returned a verdict reducing first degree murder based on intent or knowledge to second degree murder. But since second degree murder does not apply to felony murder, the jury's finding of mitigation was not legally inconsistent with a guilty verdict as to felony murder.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

IDENTIFICATION

§27-7

People v. Lerma, 2016 IL 118496 (No. 118496, 1/22/16)

1. In **People v. Enis**, 139 Ill. 2d 264, 564 N.E.2d 1135 (1990), the Illinois Supreme Court recognized developing authority in some jurisdictions that expert testimony concerning eyewitness identification should be admissible in certain circumstances, but suggested caution against the overuse of such testimony. Here, the court recognized that in the decades since **Enis** there has been a dramatic shift in the legal landscape such that the admission of expert testimony concerning the reliability of eyewitness testimony has become widely accepted. The court concluded, “[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony.”

2. The court concluded that the trial court abused its discretion by denying defendant's motion to admit expert testimony concerning the reliability of eyewitness identification testimony. Defendant initially presented a pretrial motion *in limine* to allow a witness who was an attorney and a licensed psychologist to testify as an expert on the topic of memory and eyewitness identification. The trial court denied the motion, stressing that the eyewitnesses knew defendant prior to the shooting.

Defense counsel filed a motion to reconsider and indicated that the expert would testify that misidentifications have occurred where witnesses knew the person who was identified beforehand. The trial court denied the motion to reconsider, stating that the most “glaring” reason was that the witnesses claimed to have known defendant before the offense. The court also noted that according to an Ohio Court of Appeals opinion,

some 12 years earlier the defense's expert witness testified that the factors which indicate that eyewitness identification testimony is unreliable apply where the eyewitness is viewing a stranger. The trial court acknowledged that the expert contested the accuracy of the Ohio court's description of his testimony in that case, but stated that where an appellate court justice made such a description, "I am not going any further down that road."

Defendant then filed a second motion to reconsider, tendering the report of a second expert who was a professor of psychology and a widely recognized expert in the field of human perception and memory. Before the second motion to reconsider was filed, the original expert had passed away. The new expert testified that although it would seem "intuitive to a jury" that a witness's identification would be more accurate if he or she is acquainted with the suspect, "this is not necessarily true."

The trial court again denied the motion to reconsider, stating that it was ruling for the same reasons it set forth in denying the admission of the original witness's testimony.

In finding an abuse of discretion, the Supreme Court stated that expert testimony on the reliability of eyewitness identification was both relevant and appropriate because the only evidence against defendant consisted of eyewitness identifications made by two witnesses, one of whom was deceased at the time of trial and whose identification was admitted as an excited utterance. In addition, most of the factors which both experts identified as potentially contributing to the unreliability of eyewitness testimony "are either present or possibly present in this case." These factors include the stress of the event itself, the use and/or presence of a weapon, the use of a partial disguise, exposure to post-event information, the fact that the event occurred at night, and the fact of cross-racial identification.

Furthermore, because one of the eyewitnesses had died, only one of the two eyewitnesses was subject to cross-examination. It was also unclear whether the witness who did testify actually knew the defendant before the identification, as she stated that she had seen him either 10 times or only once or twice, and in any event had only viewed him from across the street without ever speaking to him or being in the same room or house. When asked directly how long she had known the defendant before the shooting, she responded, "I did not know him." Under these circumstances, expert eyewitness testimony on the reliability of eyewitness identification would have been probative.

3. The court also concluded that the trial judge abused his discretion by denying admission of the second expert's testimony based on its rejection of the proposed testimony of the expert who died before trial. The original witness's proposed testimony was rejected because of the judge's "personal conviction" that mistaken identifications are unlikely where the witness and perpetrator knew each other before the offense.

The Supreme Court criticized the trial court's reasoning, noting that the first expert's report specifically addressed the issue of the likelihood of mistaken identifica-

tions where the witness and suspect knew each other and rebutted the trial court's assumptions about what the expert would say. In addition, the reasons for excluding the first expert's testimony had nothing to do with the testimony of the second expert, whose report flatly contradicted the trial court's beliefs and whom the parties agreed was a qualified and highly respected expert. By relying on its personal beliefs concerning eyewitness identifications as the primary basis for denying the admission of the second witness's testimony, the trial court not only ignored the explicit contents of the report of the expert but substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert. The court also noted that the trial court's ruling was undercut by the conflict in the record concerning the extent to which the surviving eyewitness actually knew defendant before the offense.

Finally, the court rejected the trial court's belief that the first expert's testimony could be rejected based on a single sentence in an Ohio court opinion describing the expert's testimony in an earlier trial. Not only did the expert contest the accuracy of the Ohio court's summary of the evidence, but the testimony occurred some 13 years before the trial in this case. Rather than allow the witness to testify, however, the trial court chose to treat a one-sentence summary of the witness's testimony 13 years earlier "not only as indisputably accurate but also as a binding and authoritative representation" of the expert's opinion at the time of trial.

4. The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The trial court's ruling prevented the jury from hearing relevant and probative expert testimony concerning the State's sole testifying eyewitness in a case in which there was no physical evidence connecting defendant to the crime, the remaining evidence of guilt was not overwhelming, and the excluded testimony was neither duplicative nor cumulative of other evidence.

Defendant's convictions for first degree murder and aggravated discharge of a weapon were reversed and the cause remanded for a new trial.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)

JUVENILE

§33-6(a)

Montgomery v. Louisiana, ___ U. S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2016) (No. 14-280, 1/25/16)

1. Under **Teague v. Lane**, 49 U. S. 288 (1989), federal courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules which forbid criminal punishment of certain primary conduct as well as those which

prohibit a certain category of punishment for a class of defendants because of their status or offense.

The court concluded that when a new substantive rule of constitutional law controls the outcome of a case, the States are constitutionally required to give retroactive effect to that rule in State collateral proceedings. The court stressed that substantive constitutional rules place certain persons or punishments beyond the State's criminal enforcement power, and that by definition a conviction or sentence is unlawful where it is created by an unconstitutional provision.

2. Under **Miller v. Alabama**, 567 U. S. ___, 132 S.Ct. 2455 (2012), a juvenile convicted of homicide cannot be sentenced to life imprisonment without the possibility of parole unless the trial court first considers the minor's special circumstances in light of the principles and purposes of juvenile sentencing. **Miller** did not bar a life sentence without parole in all cases, but limited such sentences to juvenile offenders whose crimes reflect "irreparable corruption."

The court concluded that **Miller** announced a substantive rule because it barred the imposition of a mandatory life sentence without parole upon juvenile offenders "whose crimes reflect the transient immaturity of youth." Thus, **Miller** rendered life without parole an unconstitutional penalty for a class of defendants because of their status.

Because **Miller** announced a substantive rule, it must be applied retroactively in state collateral review proceedings. The court noted, however, that giving **Miller** retroactive effect does not require States to relitigate sentences or convictions in every case in which a juvenile offender received life without parole. Instead, a **Miller** violation may be remedied by permitting juvenile homicide offenders to be considered for parole.

PROBATION, PERIODIC IMPRISONMENT, CONDITIONAL DISCHARGE & SUPERVISION

§§40-1, 40-4(a)

People v. Clendenny, 2016 IL App (4th) 150215 (No. 4-15-0215, 1/26/16)

1. Section 5-7-1 of the Unified Code of Corrections defines periodic imprisonment as "a sentence of imprisonment during which the defendant may be released for periods of time" to participate in a number of activities, including work. A sentence of periodic imprisonment shall be for a definite term of up to 18 months, or the longest sentence of imprisonment that could have been imposed, whichever is shorter. But a term of periodic imprisonment may not exceed one year if the defendant participates in a county work-release program. 730 ILCS 5/5-7-1.

2. The trial court sentenced defendant to 30 months' probation, including 18 months of periodic imprisonment. The court agreed to allow defendant to be released for work, alcohol treatment, and to be present at the birth of his child. In describing the sentence, the court used the terms "periodic imprisonment" and "work release" interchangeably.

3. Defendant argued that the 18 months of periodic imprisonment was improper because the maximum term of work release is 12 months. The Appellate Court rejected this argument, holding that defendant's periodic imprisonment with release for work, alcohol treatment, and the birth of his child, did not equally compare with participation in a county work-release program.

A work-release program is guided by specific parameters and subject to specific rules, sanctions, wages, and working conditions. By contrast, the conditions of defendant's periodic imprisonment were more lenient and flexible, allowing defendant much greater independence than a work-release program. Although the trial court referred to the probation condition as "work release," that did not establish that the court was actually imposing work release within the meaning of the statute.

Defendant's sentence was affirmed.

SEARCH AND SEIZURE

§§44-3, 44-5(a)

People v. Lee, 2016 IL App (2d) 150359 (No. 2-15-0359, 1/28/16)

An arrest made outside the arresting officer's jurisdiction is valid if there is probable cause to believe that the suspect committed an offense in the officer's jurisdiction. The court concluded that an officer who parked his squad car just outside the municipal limits of the city for which he worked, and who used a radar unit to monitor the speed of vehicles inside city limits, had sufficient probable cause to arrest drivers who according to the radar were exceeding the speed limit inside the city. The validity of the arrests was not affected by the fact that the officer stopped the vehicles outside city limits.

The court distinguished the situation where an officer uses a radar gun to monitor the speed of vehicles which are driving outside the officer's jurisdiction. In such a case, the arrest cannot be based on the officer's official authority. Furthermore, such an arrest cannot be sustained as a citizen's arrest because an officer who uses a radar unit outside his or her jurisdiction asserts official police authority that would not be available to a private citizen.

§44-7(f)

People v. Chambers, 2016 IL 117911 (No. 117911, 1/22/16)

1. Under **Franks v. Delaware**, 438 U.S. 154 (1978), a hearing is required if the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit, and the allegedly false statement is necessary to the finding of probable cause. Under **Franks**, the challenge must be more than conclusory, must be supported by more than a mere desire to cross-examine, must allege deliberate falsehood or reckless disregard for the truth, and must be accompanied by an offer of proof which specifically points out the portion of the warrant affidavit that is claimed to be false.

When the defendant makes the necessary showing, the trial court must examine the warrant affidavit, setting aside the allegedly false or reckless statements, and determine whether the remaining content is sufficient to support a finding of probable cause. If not, the defendant is entitled to a **Franks** hearing.

2. Although the manifest weight of the evidence standard of review applies when reviewing the trial court's ruling on the merits after a full **Franks** hearing, the ruling on the threshold question of whether to hold an evidentiary hearing is reviewed *de novo*. The court noted that the reviewing court and the trial court are equally capable of determining whether the motion and supporting documents have made a substantial preliminary showing.

3. An informant identified only as "John Doe" appeared at the warrant hearing, but the record did not reflect exactly what occurred at the hearing. Defendant's motion for a **Franks** hearing contained an affidavit from Miles Copeland stating that he had been the informant, that he had appeared at the warrant hearing, that he was instructed by the officer not to speak, and that he was not questioned by the judge. Copeland also stated that he had signed a false affidavit because a police officer threatened him with a five-year prison sentence if he did not do so.

Rejecting the reasoning of **People v. Gorosteata**, 374 Ill. App. 3d 203, 870 N.E.2d 936 (1st Dist., 2007), the court concluded that **Franks** applies even where the search warrant rests on the statements of an informant who personally appeared at the warrant hearing and who could have been questioned by the magistrate. The court stated that a rule precluding a **Franks** hearing if an informant appeared at the warrant hearing would shield police misconduct such as conspiring with an informant or coercing an informant into making false statements in an affidavit or in testimony to the court. Thus, the presence of the informant at the warrant hearing does not foreclose the possibility of a **Franks** hearing, but is one factor to be considered in determining whether a substantial preliminary showing under **Franks** has been made.

4. The court rejected the argument that unless the State acknowledges the identity of the informant on whose statements a warrant was based, a defendant can not make the showing required by **Franks**:

The State would have us create a catch-22 so that even if the informant comes forward with evidence that would justify a **Franks** hearing, the State would be able to defeat the motion by refusing to acknowledge that he is the informant. We reject this approach. If the informant has self-identified and the defendant has otherwise sufficiently alleged intentional, knowing, or reckless falsehoods in his **Franks** motion, whether this individual was the actual informant can be ascertained at an evidentiary hearing.

5. Defendant's third motion for a **Franks** hearing, together with affidavits establishing his alibi for the time of the offense, presented a substantial preliminary showing that falsehood had been included in the warrant application either deliberately or with reckless disregard of the truth. The court also concluded that if the allegedly reckless or false statements were set aside, the warrant affidavit contained nothing but the officer's suspicions that drug sales and possession of weapons were occurring at a particular address. Because these allegations would not be sufficient to meet the probable cause standard, the cause was remanded for a **Franks** hearing.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

§§44-12(a), 44-12(c)

People v. Cummings, 2016 IL 115769 (No. 115769, 1/22/16)

1. In **Rodriguez v. United States**, 575 U.S. ___, 135 S. Ct. 1609 (2015), the Supreme Court held that the mission of a traffic stop is to address the traffic violation which warranted the stop and attend to related safety concerns, which typically include checking the driver's license of the operator, determining whether there are outstanding warrants, and inspecting the automobile's registration and proof of insurance. Any actions outside this scope are unlawful if they measurably extend the duration of the stop, unless there is reasonable suspicion to justify the detention. Thus, checking the operator's driver's license is within the mission of a traffic stop whether or not the officer has reasonable suspicion that the vehicle is being operated by an unlicensed driver.

2. Here, an officer who stopped the van which defendant was driving acted properly by checking defendant's license even though the justification for the stop ceased before the license was requested. The officer stopped the van because it was registered to a woman for whom there was an active arrest warrant. Although the officer could not see who was driving the van when he initiated the stop, he realized as he approached the stopped vehicle that the driver was male and not the woman who was the subject of the arrest warrant.

Although the reason for the stop had been satisfied, the court held that the officer could complete the mission of the stop by examining defendant's driver's license, determining whether there were any warrants, and inspecting the vehicle's registration and proof of insurance. The State was not required to show that the request for defendant's driver's license was justified by any rationale other than the traffic stop.

Because the stop was lawfully initiated and the officer could request defendant's driver's license even after he knew that the basis for the stop no longer applied, the trial court's order granting defendant's motion to suppress was reversed. The cause was remanded for trial on the charge of driving with a suspended license.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

SENTENCING

§§45-7(b), 45-7(c), 45-13

People v. Reed, 2016 IL App (1st) 140498 (No. 1-14-0498, 1/27/16)

1. Although Illinois precedent holds that fees which are improperly imposed are void and may be challenged at any time, the Appellate Court concluded that such a rule did not survive **People v. Castleberry**, 2015 IL 116916. Under **Castleberry**, an order is void only if it was entered by a court which lacked jurisdiction.

Thus, the defendant forfeits a sentencing issue that is not raised through a contemporaneous objection and a written post-sentencing motion. However, the rules of waiver and forfeiture also apply to the State, which in this case failed to make a timely argument that defendant forfeited the issue whether three "fees" imposed by the trial court were actually "fines" and were therefore subject to the \$5 per day credit against fines for time served in custody while awaiting trial.

2. It is the nature of an assessment, and not its statutory label, that determines whether it is a "fee" or a "fine." A "fee" seeks to recoup expenses incurred by the State or compensate the State for some cost of prosecution, while a "fine" is a pecuniary punishment imposed as part of a sentence.

The court accepted the State's concession that the \$50 Court System Fee (55 ILCS 5/5-1101(c)) is a "fine" that is subject to the \$5 per day credit. However, the court concluded that both the State's Attorney Record's Automation Fee (55 ILCS 5/4-2002.1(c)) and the Public Defender Records Automation Fee (55 ILCS 5/3-4012) are compensatory in nature because the assessments are intended to compensate the State and the Public Defender for the costs of establishing and maintaining an automated record keeping system. Thus, defendant is not entitled to the \$5 per day credit against those charges.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

§§45-10(a), 45-10(e)

Montgomery v. Louisiana, ___ U. S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2016) (No. 14-280, 1/25/16)

Under **Miller v. Alabama**, 567 U. S. ___, 132 S.Ct. 2455 (2012), a juvenile convicted of homicide cannot be sentenced to life imprisonment without the possibility of parole unless the trial court first considers the minor’s special circumstances in light of the principles and purposes of juvenile sentencing. **Miller** did not bar a life sentence without parole in all cases, but limited such sentences to the rare juvenile offenders whose crimes reflect “irreparable corruption.”

The court concluded that **Miller** announced a substantive rule because it barred the imposition of a mandatory life sentence without parole upon juvenile offenders “whose crimes reflect the transient immaturity of youth.” Thus, **Miller** rendered life without parole an unconstitutional penalty for a class of defendants because of their status.

Because **Miller** announced a substantive rule, it must be applied retroactively in state collateral review proceedings. The court noted, however, that giving **Miller** retroactive effect does not require States to relitigate sentences or convictions in every case in which a juvenile offender received life without parole. Instead, a **Miller** violation may be remedied by permitting juvenile homicide offenders to be considered for parole.

§45-10(c)(2)

People v. Williams, 2016 IL 118375 (No. 118375, 1/22/16)

1. Under section 408(a) of the Illinois Controlled Substance Act (Act), the trial court may sentence a defendant who has been convicted of “a second or subsequent offense under this Act” to a term of imprisonment “up to twice the maximum term otherwise authorized.” 720 ILCS 570/408(a).

2. Defendant pled guilty to unlawful delivery of a controlled substance, a Class 2 felony, in exchange for a sentencing cap of 25 years. Prior to accepting the plea, the trial court admonished him that if he did not plead guilty, he would be sentenced as a Class X offender (due to his prior convictions) and (due to his prior conviction under the Act) his maximum potential sentence could be doubled under section 408(a) to a total of 60 years imprisonment. The trial court accepted defendant’s plea and sentenced him to 25 years imprisonment.

Defendant filed a motion to withdraw his plea alleging that he was improperly admonished that he faced a 60-year sentence under section 408(a). The trial court denied the motion.

3. The Supreme Court held that defendant had been improperly admonished about the maximum potential sentence he faced. The court was “unable to say with certainty” that section 408(a) only applied to offenses in violation of the act (and thus would only double the maximum permissible sentence for defendant’s Class 2 conviction) or whether it also applied to double the maximum penalty of 30 years for a Class X sentence.

Since the meaning of section 408(a) was ambiguous, the court invoked the rule of lenity and resolved the ambiguity in favor of defendant. The court thus held that section 408(a) only applies to offenses committed in violation of the Act and could not be used to double the Class X maximum sentence of 30 years.

The court reversed defendant’s conviction and encouraged the legislature to revisit section 408(a) and clarify its meaning.

(Defendant was represented by Assistant Defender Brian Kohut, Ottawa.)

UNLAWFUL USE OF WEAPONS

§53-5(b)

People v. Tolbert, 2016 IL 117846 (No. 117846, 1/22/16)

1. In deciding whether an exemption from a criminal statute is an element that must be charged and proved by the State, courts do not look solely at where the exemption is placed in the statute. Instead, courts determine more generally whether the legislature intended the exemption to be “descriptive” of the offense, or whether it intended only to withdraw certain acts or persons from the operation of the statute.

A defendant charged with aggravated unlawful use of a weapon for possessing a firearm while under 21 years of age will not be criminally liable if he possessed the firearm while “on the land or legal dwelling of another person as an invitee with that person’s permission.” 720 ILCS 24-1.6(a)(1), (a)(3)(1). The exemption is located in both the statute describing the offense and in a separate section specifically titled “Exemptions.” 720 ILCS 5/24-2(b)(5). The exemptions section also states that a charging instrument does not need to “negative any exemptions,” and that the “defendant shall have the burden of proving such an exemption.” 720 ILCS 5/24-2(h).

2. Defendant was convicted of aggravated unlawful use of a weapon while under the age of 21 for possessing a firearm on the property of another person. The State did not charge or prove that defendant was not an invitee on that person’s property.

The Supreme Court held that the invitee requirement was not an element of the offense that the State was required to plead and prove at trial. The plain language of section 24-2 established that the legislature intended the invitee requirement to be an exemption to the offense, not an element. It was therefore the defendant's burden to prove his entitlement to the exemption, not the State's obligation to charge and prove that it did not exist.

The Supreme Court vacated the Appellate Court's decision reversing defendant's conviction and remanded the cause for consideration of defendant's remaining issues.

(Defendant was represented by Assistant Defender Rob Melching, Chicago.)

VENUE & JURISDICTION

Ch. 54

People v. Vari, 2016 IL App (3d) 140278 (No. 3-14-0278, 1/26/16)

The Appellate Court's jurisdiction in civil cases is generally limited to appeals from final judgments. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301. A final judgment is a determination by the court which disposes of all issues between the parties and terminates the litigation. The dismissal of a complaint without prejudice is not a final and appealable order.

Defendant filed an untimely *pro se* 2-1401 petition and served the State by standard United States mail. The State filed a special appearance and argued that the trial court did not have personal jurisdiction over the State because defendant failed to properly serve the State. The trial court granted the State's motion to dismiss on jurisdictional grounds. Defendant appealed.

The Appellate Court dismissed the appeal for lack of jurisdiction. The court held that defendant was not prejudiced by the dismissal and could have refiled immediately with proper service. Defendant's petition was already untimely when he filed it and there is no bar to filing successive 2-1401 petitions. A disposition on the merits of his petition could have been made much sooner if he had simply refiled than if the case had been heard on appeal and then reversed and remanded back to the trial court for further proceedings. Since the trial court's dismissal did not prejudice defendant, it was not a final appealable order.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

VERDICTS

§55-2

People v. Lefler, 2016 IL App (3d) 140293 (No. 3-14-0293, 1/21/16)

Jury verdicts are legally inconsistent when the offenses arise out of the same set of facts and a jury finds that an essential element of the offense both exists and does not exist.

The victim caught defendant breaking into his car and during an ensuing struggle, defendant stabbed the victim, killing him. At trial defendant argued that he was acting in self-defense when he stabbed the victim. The jury found defendant guilty of both felony murder and second degree murder.

The Appellate Court held that the verdicts for felony murder and second degree murder were not legally inconsistent. A defendant commits first degree murder if he kills another and he: (1) intends to kill or do great bodily harm; (2) knows that his acts create a strong probability of death or great bodily harm; or (3) is attempting or committing a forcible felony. 720 ILCS 5/9-1.

Second degree murder is a mitigated form of first degree murder, but only as to the first two forms of first degree murder. The jury first determines that defendant killed another with intent or knowledge and then determines whether mitigating factors exist that would reduce the offense to second degree murder. But second degree murder does not apply to the third form of first degree murder, felony murder. 720 ILCS 5/9-2.

The jury clearly found that mitigating factors existed and properly returned a verdict reducing first degree murder based on intent or knowledge to second degree murder. But since second degree murder does not apply to felony murder, the jury's finding of mitigation was not legally inconsistent with a guilty verdict as to felony murder.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-3(a)

People v. Lerma, 2016 IL 118496 (No. 118496, 1/22/16)

The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The Illinois Supreme Court has recognized

three approaches to determine whether an error is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence overwhelmingly supported the conviction; and (3) whether the excluded evidence would have been duplicative or cumulative.

Under each of these approaches, the exclusion of the testimony was not harmless beyond a reasonable doubt. First, there is no question that the error contributed to the defendant's conviction, as the exclusion of the testimony prevented the jury from hearing relevant and probative expert testimony relating to the State's sole testifying eyewitness in a case lacking any physical evidence linking defendant to the crime. Second, it cannot be said that the other evidence in the case overwhelmingly supported the defendant's conviction, as the only other evidence of guilt was a hearsay excited utterance from a non-testifying witness. Third, the excluded testimony was neither duplicative nor cumulative of other evidence, as the jury heard nothing the reliability of expert eyewitness testimony.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)